



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

La Crosse County Department of Human Services,
Petitioner

DECISION

v.

FOF/166236

[REDACTED] Respondent

PRELIMINARY RECITALS

Pursuant to an Administrative Disqualification Hearing request filed May 27, 2015, under Wis. Admin. Code §HA 3.03, and see, 7 C.F.R. § 273.16, to review a decision by the La Crosse County Department of Human Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on July 07, 2015, at La Crosse, Wisconsin.

NOTE: The record was held open to give the agency an opportunity to supplement the record. Later in the day on July 7, 2015, the agency submitted an Administrative Disqualification Hearing notice mailed to the Respondent in Wisconsin and an application completed by the Respondent. They have been marked as Exhibits 11 and 12, respectively.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Department of Health Services
Division of Health Care Access and Accountability
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Bob Uebele, Economic Support Worker - Benefit Recovery Specialist
La Crosse County Department of Human Services
300 N. 4th Street
PO Box 4002
La Crosse, WI 54601

Respondent:

[REDACTED]
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE:
 Mayumi M. Ishii
 Division of Hearings and Appeals

FINDINGS OF FACT

1. Respondent (CARES # [REDACTED]) received FoodShare benefits from October 2013 to February 2013. (Exhibit 4)
2. On March 13, 2013, the Respondent completed an on-line ACCESS renewal, in which she indicated that she lived with [REDACTED] and two children, [REDACTED] and [REDACTED]. She reported that [REDACTED] was working, but did not fill out his income information. (Exhibit 12)
3. The March 13, 2013 application warned the Respondent that she could be disqualified from the FoodShare Program, if she intentionally provided false information. (Id)
4. The Respondent electronically signed the March 13, 2013 renewal, indicating that the answers were correct and complete to the best of her knowledge. She also acknowledged that she understood the penalties for giving false information or breaking the rules. (Exhibit 12)
5. On September 30, 2013, the Respondent submitted an on-line ACCESS Six Month Report Form (SMRF), reporting that [REDACTED] moved out of the home on August 20, 2013, but also listing [REDACTED] under, "Existing People In Your Home." The Respondent did not report any changes in income, other than the receipt of child support for one child. The Respondent electronically signed the SMRF, indicating that the information was correct and complete to the best of her knowledge. (Exhibit 9)
6. On September 26, 2014, the Respondent completed an on-line SMRF, which indicated that [REDACTED] was not in the home anymore. The Respondent did not report any changes in income. She electronically signed the SMRF, indicating that the information was correct and complete to the best of her knowledge. (Exhibit 9)
7. On May 28, 2015, the agency prepared an Administrative Disqualification Hearing Notice, alleging that the Respondent committed an intentional program violation (IPV) by failing to report [REDACTED] and his income when she completed SMRFs on October 1, 2013, and on September 26, 2014, and when she completed a FoodShare interview on April 14, 2014. (Exhibits 1 and 11)
8. The aforementioned notices were sent to the Respondent at the address she reported in the September 2014 SMRF and at an address in Mississippi. (Exhibits 1 and 11)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. **Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.** If the household member is found to have committed an intentional program violation but a hearing official later determines that the household

member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, **the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.**

Emphasis added

This hearing took place on July 7, 2015. The Respondent was advised of the date and time of the hearing in an Administrative Disqualification Hearing Notice that was sent to her at the address she reported in her September 2014 SMRF and at an address in Mississippi. The notice instructed the Respondent to contact the administrative law judge with a phone number where she could be reached for the hearing, but she never did. Mr. Uebele testified that neither notice was returned to the agency.

An attempt was made to contact the Respondent at a phone number in the file, [REDACTED], but the outgoing message indicated that the number was a [REDACTED] number and that the call would not go through, since the customer had not called me before. Another attempt was made to reach the Respondent at [REDACTED], but the outgoing message indicated that the voicemail box was not set up.

Consequently, the hearing took place without the Respondent. The Respondent has not contacted the Division of Hearings and Appeals within ten days of the hearing date. As such, it is found that she did not have good cause for her failure to appear at the hearing.

What is an Intentional Program Violation (IPV)?

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

3.14.1 IPV Disqualification

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
 2. Administrative Disqualification Hearing (ADH) decision,
 3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements,
- or

4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

FoodShare Wisconsin Handbook, §3.14.1.

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

What is the agency's burden of proof?

In order for the agency to establish that a FoodShare (FS) recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

Thus in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the two elements have been shown.

The Merits of the Agency's Case

In the case at hand, the agency asserts that the Respondent intentionally provided false information about her household composition and income. Specifically, the agency asserts that Respondent completed a SMRF on October 1, 2013, completed a FoodShare Interview April 14, 2014, and completed a SMRF on September 26, 2014, but failed to report [REDACTED] and his income.

The record does not support the agency's case.

First, the agency has not provided a SMRF dated October 1, 2013. As such, it has not met its burden to prove any violation with regard to an October 1, 2013 SMRF.

I do note that the Respondent completed a SMRF on September 30, 2013, in which she indicated that [REDACTED] moved out of the home on August 20, 2013. However, that SMRF also listed [REDACTED] under "Existing People in Your Household". It is not clear from the record whether verification was obtained of [REDACTED] and his income leaving the residence. (Per *FSH §1.2.6.1*, it is mandatory to verify income, and it is mandatory to verify household composition, if it is questionable.) If the Respondent submitted a falsified verification, the agency did not provide a copy of it. Consequently, there is insufficient evidence to establish a violation with regard to the September 30, 2013 SMRF. In any event, it was not mentioned in the Administrative Disqualification Hearing Notice and as such, cannot form the basis of an IPV determination, at this time.

Second, the agency has not provided a copy of a renewal or any case comments showing what the Respondent reported or said to the agency on April 14, 2014. Because there is no contemporaneous documentation of what the Respondent said, there is no way to know whether she lied or otherwise provided false information on April 14, 2014.

Third, while the agency provided a copy of a SMRF that the Respondent completed on September 26, 2014, in which the Respondent did not include [REDACTED] and his income in her household, the agency does not have sufficient evidence to show that [REDACTED] was living with the Respondent.

In order to prove that [REDACTED] was in the Respondent's home, the agency relied upon two CCAP printouts showing that the address listed for [REDACTED] was the Respondent's address. However, it is unclear where the courts obtained this information. Was it taken from prior court filings? Was it taken from the citation? If it was, did the officer get the information from [REDACTED] or from his driver's license? If so, how current was the information on the driver's license? Given these uncertainties, the hearsay information in the CCAP printouts are not sufficient to establish where [REDACTED] was living.

The agency also relied upon a National Comprehensive Report, which the agency's private investigator indicated is a privately run data base that culls information from various public records and credit reporting agencies. Thus, the report contains multiple layers of hearsay, the reliability of which cannot be determined. As such, the National Comprehensive Report is not sufficient to establish [REDACTED]'s residence, by clear and convincing evidence.

██████████, the agency's private investigator, testified that he spoke to the Respondent on February 21, 2015, at which time she admitted that ██████ had been living with her, but he did not pin her down on the period of time that ██████ had been living with her and there is no indication that he obtained a signed statement from the Respondent. As such, ██████████'s testimony is not sufficient to prove where ██████ was living.

Mr. Uebele testified that he also spoke to the Respondent on or about March 3, 2015, and reviewed the concurrent overpayment notices for the period of November 1, 2013 through February 28, 2015. Mr. Uebele testified that during that conversation, the Respondent admitted that ██████ had been living with her during the overpayment period.

While admissions made by the Respondent might fall outside the definition of "hearsay" as an admission of a party opponent under Wis. Stats. §908.01(4)(b)1., the fact remains that the agency has not provided any case comments or any other contemporaneous notes to substantiate Mr. Uebele's conversation with the Respondent. An ALJ cannot simply take the agency representative at his or her word that the Respondent made clear admissions against her interests. That would open the door to potential abuse by less scrupulous individuals. Thus, in the absence of any contemporaneous notes or other reliable, corroborating evidence, Mr. Uebele's testimony, on its own, is not sufficient to prove, by clear and convincing evidence, that ██████ was living with the Respondent during the times in question.

Based upon the foregoing, it is found that the agency has not met its burden to prove, by clear and convincing evidence, that ██████ was living with the Respondent after September 2014. Consequently, it cannot prove the Respondent lied by excluding ██████ from her household.

CONCLUSIONS OF LAW

The agency has not met its burden to prove, by clear and convincing evidence, that the Respondent committed an IPV by providing false information about her household composition and income.

THEREFORE, it is

ORDERED

That IPV case number ██████████ is hereby reversed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied. See also, 7 C.F.R. sec. 273.16(e)(4) for the specific time limits for claiming good cause for missing the scheduled hearing.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

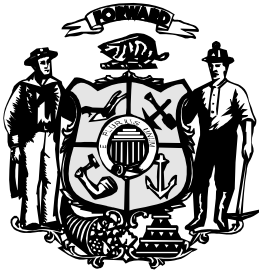
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 20th day of July, 2015.

\sMayumi M. Ishii
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 20, 2015.

La Crosse County Department of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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